

In the Matter of the Compensation of
JARED R. ZEIGLER, DCD, Claimant
WCB Case Nos. 20-04805, 18-00953, 17-05056, 17-04676
ORDER ON REVIEW
Gatti Law Firm, Claimant Attorneys
Stebbins & Coffey, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys
Olson & Dickson LLP, Defense Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ceja and Curey.

Gallagher Basset Services (GBS) requests review of Administrative Law Judge (ALJ) Jacobson's order that: (1) set aside its denial of the decedent's fatal injury claim; (2) upheld denials of the claim issued by the SAIF Corporation on behalf of Billeter Marine LLC/Billeter Roads & Forestry LLC and Atlas Leasing; and (3) awarded an assessed attorney fee of \$32,000 pursuant to ORS 656.308(2)(d), payable by GBS/Employer Solutions Staffing Group, LLC (ESSG).¹ On review, the issues are responsibility and attorney fees. We affirm in part and modify in part.²

¹ Claimant, Tyra Zeigler, is the surviving spouse of the deceased worker, Jared R. Ziegler.

² We adopt that portion of the ALJ's order addressing the "responsibility" issue. On review, GBS contends that Billeter Roads and Forestry (Billeter) should be judicially estopped from claiming that it was not claimant's direct employer, because it made multiple assertions in a civil suit that it was claimant's direct employer. For the reasons expressed in the ALJ's order, we disagree with that contention. In doing so, we note that Billeter's "position" was not "successfully asserted" in the earlier proceeding. *See Caplener v. U.S. National Bank*, 112 Or App 401, 415, 831 P2d 22, *rev allowed* 314 Or 573 (1992) (judicial estoppel bars a party from "asserting a position that is in conflict with a position that it successfully asserted in an earlier judicial proceeding"); *Larry R. Wahl*, 58 Van Natta 526, 530 (2006).

Further, GBS asserts that we should take "judicial notice" of a previous "summary judgment" motion where Billeter sought a ruling from the court finding that it was claimant's direct employer at the time of his death. *See Groshong v. Montgomery Ward Co.*, 73 Or App 43 (1985) (Board may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Timothy C. Guild*, 68 Van Natta 741, 743 n 3 (2016) (Board may take administrative notice of agency orders involving the same claimant).

As previously explained, we have concluded that SAIF/Billeter should not be estopped from asserting a position as to its employment relationship with claimant. Therefore, we need not decide whether we may take administrative notice of the summary judgment motion because, even if we did so, it would not affect the outcome of this dispute. *See James Hibbs*, 75 Van Natta 27, 27 n 1 (2023) (declining to take administrative notice of a Hearings Division order when taking notice would not affect the outcome of the appeal).

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

For services at the hearing level, claimant's attorney was awarded \$32,000 under ORS 656.308(2)(d). The ALJ considered the factors contained in OAR 438-015-0010(4) and concluded that "extraordinary circumstances" justified an attorney fee award above the ORS 656.308(2)(d) attorney fee threshold of \$3,946.00. On review, GBS contests the ALJ's attorney fee award.³ Based on the following reasoning, we modify the ALJ's attorney fee award to be awarded under ORS 656.307(5).⁴

ORS 656.307(5) authorizes attorney fees for legal services before an ALJ in a proceeding under ORS 656.307 where only responsibility is disputed. *See Dean Warren Plumbing v. Brenner*, 150 Or App 422, 427 (1997). Such a fee is appropriate when a "307" order has been issued. *See* ORS 656.307; *cf. Bruce D. Wilson*, 73 Van Natta 409, 410 (2021) (attorney fees cannot be awarded under ORS 656.307(5) when no "307" order was issued).

³ On review, oral argument has been requested. We do not ordinarily entertain oral argument. OAR 438-011-0015(2). We may, nevertheless, allow oral argument where the case presents an issue of first impression that could have a substantial effect on the workers' compensation system. OAR 438-011-0031(2); *Michael D. Leming*, 70 Van Natta 144, 144 n 1 (2018); *Wendy L. Mohr*, 69 Van Natta 236, 236 n 1 (2017). The decision to grant such a request is solely within our discretion. OAR 438-011-0031(3).

Here, we are not persuaded that oral argument would assist us in reaching our decision because the parties have had an opportunity to thoroughly develop the issues for resolution. Accordingly, we decline to grant the request for oral argument. *See Patricia J. Schiffer*, 62 Van Natta 3012, 3012 n 1 (2010); *Dale F. Cecil*, 51 Van Natta 1010 (1999).

⁴ On review, GBS requested that we remand the case to the ALJ for "further consideration consistent with the law." For the following reasons, we deny the motion for remand.

If the Board determines that a case has been improperly, incompletely, or otherwise insufficiently developed or heard by the ALJ, it may remand the case to the ALJ for further evidence taking, correction, or other necessary action. ORS 656.295(5).

Here, GBS contends that remand to the Hearings Division is appropriate because the ALJ erred in the assignment of responsibility to GBS. We do not find this a compelling reason to remand. *See Rosemary E. Wadnizak*, 63 Van Natta 218, 219 (2011) (denying a motion to remand when there was no "compelling reason" to remand). Therefore, without further justification from GBS, we deny the motion for remand. *See SAIF v. Avery*, 167 Or App 327, 333 (2000) (a compelling reason justifying remand to the Hearings Division exists only when the new evidence (among other things) is likely to affect the outcome of the case); *Donald R. Mills*, 68 Van Natta 2020, 2020 n 1 (2016) (no compelling reason to remand when the claimant did not ask for admission of additional evidence and did not claim that the record was not adequately developed).

Here, the Director issued an Order Designating Paying Agent on December 4, 2017, pursuant to ORS 656.307 (a “307” order). (Ex. 48). That order designated GBS, as the employer with the lowest rate of temporary disability compensation, as the designated paying agent. The “307” order further referred the matter to the Hearings Division pursuant to ORS 656.307(2) to issue an order regarding responsibility. (*Id.*) Because the hearing before the ALJ was a proceeding under ORS 656.307, any attorney fee to claimant’s attorney is awardable under ORS 656.307(5). *See William H. Lodge*, 69 Van Natta 924, 925 n 1 (2017) (because the hearing before the ALJ was a proceeding under ORS 656.307, the ALJ appropriately granted an attorney fee award under ORS 656.307); *Don E. McBride*, 67 Van Natta 1808, 1808 n 1 (2015) (same).

Moreover, an attorney fee award under ORS 656.307(5) requires that claimant’s attorney “actively and meaningfully participates” in the proceeding. “Meaningful” participation requires that claimant’s counsel “clearly and firmly take a position on which insurer should ultimately be held responsible.” *See Keenon v. Employers Overload*, 114 Or App 344, 346-47 (1992). If a claimant’s attorney does not display “a material, substantial interest” in deciding who the responsible party is or take a position advocating that interest, claimant’s attorney is not entitled to an attorney fee award under ORS 656.307(5). *See Steven M. Swearingen*, 62 Van Natta 2470, 2473 (2010).

In this case, claimant took a clear position on which employer should ultimately be held responsible by contending that responsibility for the claim rested with ESSG or Atlas. Under such circumstances, we find that claimant’s attorney “meaningfully” participated in the responsibility proceeding by taking a position as to which parties should ultimately be held responsible. *See Keenon*, 114 Or App at 346-47. Furthermore, claimant’s attorney “actively” participated in the proceeding by marshalling the case to hearing, responding to procedural matters, addressing motions, and participating in the three-day hearing.

Accordingly, based on the aforementioned reasoning, we conclude that claimant’s counsel is entitled to an ORS 656.307(5) attorney fee for his services at the hearing level.^{5 6} After considering the factors set forth in OAR 438-015-

⁵ Under ORS 656.307(5), claimant’s counsel is not entitled to an attorney fee for services on review. *See William H. Lodge*, 69 Van Natta 924, 926 n 1 (2017) (there is no statutory authority under ORS 656.307 to award an assessed attorney fee for the claimant’s counsel’s services on review); *Frank Jung*, 64 Van Natta 1998, 2004 n 8 (2012) (same).

⁶ Attorney fees for prevailing against responsibility denials are governed by ORS 656.308(2)(d), except for proceedings governed by ORS 656.307. *Liberty Northwest Ins. Corp. v. Kaleta*, 173 Or App 82, 89 (2001).

0010(4) and applying them to this case, we find that a reasonable fee amount for claimant's attorney's services at the hearing level is \$32,000, payable by GBS/ESSG. In reaching this conclusion, in addition to the reasons set forth in the ALJ's order, we have particularly considered the time devoted to the responsibility issue (as represented by the hearing record, claimant's counsel's representations regarding a reasonable fee, and the carriers' objections), the complexity of the issue, the nature of the proceedings, and the contingent nature of the practice of workers' compensation law. Thus, in lieu of the ALJ's \$32,000 attorney fee award under ORS 656.308(2)(d), we find that claimant's counsel is entitled to a \$32,000 attorney fee award under ORS 656.307(5). The ALJ's attorney fee award is modified accordingly.

Because the ALJ's attorney fee award has not been reduced or disallowed, claimant is entitled to an ORS 656.382(3) attorney fee for his efforts in defending that award on Board review. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable assessed fee under ORS 656.382(3) for claimant's counsel's services on review regarding the attorney fee issue is \$1,000, payable by GBS/ESSG. In reaching this conclusion, we have particularly considered the time devoted to the issue, the complexity of the issue, the value of the interest involved, the risk of claimant's counsel going uncompensated, and the contingent nature of the practice of workers' compensation law.

ORDER

The ALJ's order dated April 29, 2022, is affirmed in part and modified in part. In lieu of the ALJ's \$32,000 attorney fee awarded under ORS 656.308(2)(d), claimant's counsel is awarded a \$32,000 attorney fee under ORS 656.307(5), payable by GBS/ESSG. The remainder of the ALJ's order is affirmed. For services on review regarding the attorney fee issue, claimant's counsel is awarded an assessed fee of \$1,000, payable by GBS/ESSG.

Entered at Salem, Oregon on May 15, 2023

Here, GBS raised an ORS 656.308(2)(d) fee issue for claimant's counsel's services performed prior to the issuance of the "307" order. Yet, because claimant did not "finally prevail" over the responsibility denial when the Workers' Compensation Division issued the "307" order, the criteria for an ORS 656.308(2)(d) fee would not be satisfied. *See Howard R. Mather*, 49 Van Natta 792, 796 (1997) (declining to award an ORS 656.308(2)(d) attorney fee when the claimant did not "finally prevail" against a responsibility denial). Therefore, an ORS 656.308(2)(d) attorney fee award is not applicable. Additionally, because responsibility was the only issue in dispute, ORS 656.386(1) does not apply. *See Bruce D. Wilson*, 73 Van Natta 409, 410 (2021).